



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2005

Ms. Carol Longoria
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2005-04318

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224385.

The University of Texas Southwestern Medical Center (the "medical center") received a request for (1) nine categories of information regarding a former medical resident at the medical center, and (2) the current number of faculty and residents at the medical center and the University of Texas system medical schools who are working under probation or restrictions as outlined by the Texas State Board of Medical Examiners. You state that you have no information responsive to items five, seven, and ten of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.114, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the medical center's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. See Gov't Code § 552.301(b). In addition, within fifteen

¹ We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

business days of receiving the request, the governmental body is required to submit (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(A).

You state that the medical center received the initial request for information on February 24, 2005. On February 25, 2005, you state that the medical center asked the requestor for clarification of item 10 of her request. *See id.* § 552.222; *see also* Open Records Decision No. 31-(1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Thus, with regard to item 10, the ten business day time period to request a decision from this office under section 552.301(b) was tolled on the date that the medical center sought clarification from the requestor. *See id.* § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). We note, however, that although section 552.222 tolls the deadline for seeking a ruling from this office with regard to the portion of the request for which clarification is sought, section 552.222 does not relieve the medical center of its obligation to timely request a decision from the office in compliance with section 552.301 with regard to the portions of the request for which it does not seek clarification. Gov't Code § 552.222. Accordingly, the deadline for submitting a request for decision regarding the information for which the medical center did not seek clarification was March 10, 2005. You did not, however, request a decision from this office until March 15, 2005. You also did not submit written arguments for your claimed exceptions and the information that you seek to withhold until March 22, 2005; therefore, you also failed to comply with the fifteen-business-day deadline prescribed by section 552.301(e) for this information. *See id.* § 552.301(e)(1)(D). Thus, you failed to comply with section 552.301 in requesting this decision.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.101, 552.114, 552.130, 552.136, and 552.137 of the Government Code can provide compelling reasons to overcome the presumption of openness under section 552.302; therefore, we will address your arguments under those exceptions.

Next, we note that the submitted information includes personal access code information that is not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in this decision and our review of the information at issue, we determine that the personal access code information that we have marked does not constitute public information under section 552.002 of the Government Code. Accordingly, this information is not subject to the Act and need not be released.

We now turn to your arguments regarding the submitted information. You claim that the submitted documents constitute student records that are excepted from disclosure under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

In this instance, the submitted information consists of records pertaining to a former medical resident. In the attached June 22, 1995 letter to the University of Maryland Medical Systems, the director of the Family Policy Compliance Office (the "FPCO"), the entity charged with implementing FERPA, addressed the applicability of FERPA to the records of medical residents. The director states that "[a] medical resident who works at a hospital is not a 'student' as that term is defined in FERPA [because] [t]he individual has received the Doctor of Medicine degree—the terminal degree for the profession—from a medical school and has completed his or her education as a 'student.'" Accordingly, the director concludes that "[e]valuative records pertaining to [medical residents'] practical experience as doctors who have completed their education are not 'education records' under FERPA." Based on the interpretation and reasoning set forth in the FPCO's letter, we find that the submitted information does not constitute "student records" under FERPA, and therefore none of it may be withheld under section 552.114 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Medical peer review is defined by the Medical Practice Act (the "MPA"), found at subtitle B

of title 3 of the Occupations Code, to mean “the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care rendered by those practitioners.” Occ. Code § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]” *Id.* § 151.002(a)(8). Section 160.007 of the MPA states that, “[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” *Id.* § 160.007.

Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code §§ 161.032(a),(c),(f). Section 161.031(a) defines a “medical committee” as “any committee . . . of (3) a university medical school or health science center” Section 161.031(b) provides that the “term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization [or] university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services” *Id.* § 161.0315(a).

You assert that the submitted information “was either created and/or is maintained by” a peer review or medical committee. We have marked the documents that constitute records of a peer review committee that must be withheld under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code. Upon review of the remaining

submitted information, however, we conclude that these documents constitute records made or maintained by the medical center in the regular course of business, and therefore are not protected under either section 160.007 or section 161.032. *See Memorial Hosp. - The Woodlands v. McCown*, 927 S.W.2d (Tex. 1996) (holding that statutory language “records made or maintained in the regular course of business” meant “records kept in connection with the treatment of [a hospital’s] individual patients as well as the business and administrative files and papers apart from committee deliberations.”); *In re Methodist Hosp.*, 982 S.W.2d (Tex. App.—Houston [1st Dist] 1998) (hospital’s infectious disease reports were “kept in the regular course of business,” as reports were made available to groups outside of committees that produced documents, and reports thus were not protected by privileges for proceedings and records of hospital medical committees and medical peer review committees); *see also Harris Hosp. v. Schattman*, 734 S.W.2d 759 (Tex.App.—Fort Worth, 1987) (letters written by hospital to physician were discoverable in medical malpractice action against physician and hospital; physician was obviously aware of information contained in letters, including identities of any sources of criticism of physician contained therein, and thus, denial of discovery of correspondence would not serve intended purpose of permitting open and thorough review of physician’s practice and right to continued practice on hospital’s staff). Accordingly, no portion of the remaining submitted information may be withheld under section 552.101 of the Government Code in conjunction with either section 160.007 of the Occupations Code or 161.032 of the Health and Safety Code.

We note that the submitted information includes documents that are subject to section 611.002 of the Health and Safety Code, which applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health records that are confidential under section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

The submitted documents also include an Employment Eligibility Verification, Form I-9. Title 8, section 1324a of the United States Code, which is also encompassed by section 552.101 of the Government Code, provides that this form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that this document, which we have marked, is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also raise section 552.101 of the Government Code in conjunction with common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental, *see* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy).

We have marked the information that the medical center must withhold under section 552.101 in conjunction with common law privacy. The remainder of the submitted information does not contain highly intimate or embarrassing facts, and is subject to a legitimate public interest. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the medical center may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the remaining information, we find that it does not contain information that is confidential under

constitutional privacy; therefore, the medical center may not withhold any portion of the remaining information under section 552.101 of the Government Code on that basis.

We note that portions of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the medical center may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. If the former employee at issue timely elected to keep the information we have marked confidential, the medical center must withhold this information under section 552.117 of the Government Code. The medical center may not withhold the marked information under section 552.117 of the Government Code if the former employee at issue did not make a timely election to keep this information confidential.

In the event that the former employee's social security number is not excepted from disclosure under section 552.117(a)(1), we note that it may be confidential under section 552.101 of the Government Code in conjunction with federal law. The 1990 amendments to the Social Security Act make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from disclosure on the basis of that federal law. We caution, however, that the Act prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Prior to releasing social security number information, the medical center should ensure that no such information was obtained or is maintained by the medical center any provision of law enacted on or after October 1, 1990.

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." *Id.* § 552.130. Thus, the medical center must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

You also argue that section 552.136 is applicable to the former employee's social security number. Section 552.136 of the Government Code states that "[n]otwithstanding any other

²This office will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. We note, however, that the social security number at issue does not constitute a “credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body.” Accordingly, the medical center may not withhold the former employee’s social security number under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the individuals to whom the e-mail addresses at issue pertain have affirmatively consented to the release of their e-mail addresses. The medical center must, therefore, withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the marked personal access code information is not subject to the Act and need not be released to the requestor. The information we have marked must be withheld under section 552.101 of the Government Code in conjunction with the following: (1) section 160.007 of the Occupations Code, (2) section 611.002 of the Health and Safety Code, and (3) common law privacy. The marked I-9 form may only be released in compliance with the federal laws and regulations governing the employment verification system. If the former employee at issue made a timely election under section 552.024 of the Government Code to keep the information we have marked confidential, this information must be withheld under section 552.117 of the Government Code. Even if the former employee did not make such a timely election under section 552.024 of the Government Code, his social security number may be confidential under federal law. The marked Texas motor vehicle record information must be withheld under section 552.130 of the Government Code. The marked e-mail addresses must be withheld under section 552.137 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 224385

Enc. Submitted documents

c: Ms. April Kinser
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